IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA (Asheville)

CARYN DEVINS STRICKLAND, formerly known as Jane Roe, Plaintiff	)	
-VS-	)	CA No. 20-00066-WGY Pages 1 - 40
UNITED STATES OF AMERICA, et al, Defendants	)	

BENCH TRIAL - DAY SIX

CLOSING ARGUMENTS

BEFORE THE HONORABLE WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 18
Boston, Massachusetts 02210
January 4, 2024,

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
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A P P E A R A N C E S:

FOR THE PLAINTIFF:

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FOR THE DEFENDANTS:

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I N D E X

P R O C E E D I N G

THE CLERK: The United States District Court is in session. You may be seated. Now hearing Civil Matter 20-00066, Strickland v. The United States, et al.

THE COURT: Good morning, Counsel. We've come to final arguments in this case. As I've already announced, the order of argument will be the defense first and then the plaintiff, as the plaintiff bears the burden of proof, and one-half hour, no more than one-half hour, though that's not an invitation to take that time, per side.

10:02

One thing I should say -- and counsel will understand this -- in the course of the argument, I may suggest things or say, "Well, assuming I found this" or "Isn't it true that the following?" No one should think that that's a forecast of the findings of fact and conclusions of law. It's just questions that I have that you may have a chance to answer.

So with those things stated, we'll hear first from the Judiciary defense here.

MR. KOLSKY: Thank you, your Honor. This is Josh Kolsky on behalf of the defendants, and if I may, I'd like to reserve five minutes for rebuttal.

10:03

THE COURT: No. We have no rebuttal. I'll hear you.

MR. KOLSKY: Thank you, your Honor.

The Federal Judiciary takes reports of sexual harassment very seriously. In this case, the evidence shows that

Ms. Strickland was not subjected to sexual harassment or deliberate indifference, and there was no violation of her due process rights. Rather, the incidents that Ms. Strickland points to as supposedly constituting sexual harassment were ordinary workplace interactions that Ms. Strickland has misinterpreted, just as she has misinterpreted many other interactions. Her subjective beliefs about the events at issue simply do not comport with the objective evidence at trial. As the investigator who looked into Ms. Strickland's claims put it, she experienced sexual harassment only in her mind. The evidence at trial has shown that that conclusion was exactly right.

10:04

Under the Fourth Circuit's opinion in this case, if Ms. Strickland does not prove that she was subject to sexual harassment, her equal protection claim necessarily fails. There are two ways a plaintiff can show sexual harassment, a hostile work environment theory and a quid pro quo theory. Here, Ms. Strickland's sexual harassment claim is based on three emails in June, 2018, in which JP Davis offered to get a drink with her; one occasion in June, 2018, when Mr. Davis offered her a ride home; and one email in May, 2018, with the subject "mas dinero." So I want to talk about each of those.

10:04

As to the three drink emails, Ms. Strickland and Mr. Davis both testified that they had gotten drinks together on multiple prior occasions, including at least once at

Ms. Strickland's invitation. Ms. Strickland never told Mr. Davis that she was no longer comfortable getting a drink with him. On the contrary, she told him on May 18, 2018, words to the effect of, "Anytime you want to buy me lunch or a drink, I'll take it." Given that statement, it couldn't possibly be sexual harassment when Mr. Davis offered to get a drink with her a couple weeks later.

Keep in mind that their drink emails were just casual offers to get a drink while discussing work topics, and each made clear Ms. Strickland was free to decline.

10:05

June 1st: "I'm happy to offer a drink and an ear if you need one, though I get the feeling you are not comfortable talking to me about it. Might I suggest Maryellen?"

June 19th: "I'm going to get this filed and get a celebratory drink. You're welcome to join me, but if I recall correctly, you have an appellate brief to write."

June 27th: "Can we catch up for a little bit sometime this week? I think it would be good, another mentoring session. We can do it over lunch or cut out early one day for a celebratory post-Davis drink, or we can just do it in the office."

10:06

As to the occasion when Mr. Davis offered Ms. Strickland a ride home when she was going to ride her bike home in the rain, Ms. Strickland acknowledged in her testimony that Mr. Davis had given her rides home at her request on

multiple occasions previously.

As to the "mas dinero" email, well, just hours before Mr. Davis sent that email, Ms. Strickland told him she would need a pay raise to remain working at the Federal Defender's Office. So when Mr. Davis sent an email referring to "pay for stay," he was referring to her request from earlier that day.

THE COURT: Well, excuse me. That's your conclusion, and I understand why you would make that argument, but the investigator here drew a contrary conclusion and thought that that was inappropriate, quid pro quo, sexual harassment.

Now, it does seem, one, that there's an independent investigator; that's the conclusion that she drew after what appears to be a thorough investigation here. And it likewise appears to be a basis for this letter from the Chief Judge of the Circuit, which had specific reference to Chapter 9 of the Plan. Aren't those admissions by the Judiciary that Mr. Davis was way out of line here?

MR. KOLSKY: So the investigator did not find that there was sexual harassment. In fact, she found that the evidence did not show sexual harassment.

With regard to the quid pro quo email, I think what the investigator said was that she felt that it supported the plaintiff's claim of sexual harassment, but ultimately the investigator could not find sexual harassment. And just looking at the email itself, I mean, there's not a single word

in that email that has a sexual connotation. Whatever Ms. Bean thought about how that email could be interpreted, I mean, it's up to the Court to read the email, to interpret it, to make the Court's own finding. And just on the face of it, there's nothing about it that suggests any special advance, particularly in light of the context where Ms. Strickland earlier that day had had this conversation with Mr. Davis saying that she wanted a pay raise in order to stay in the office, and that's clearly what Mr. Davis was referring to.

10:09 THE COURT: Well, it appears that Chief Judge Gregory took it seriously, and that was the basis for his -- we'll call it his "counseling letter."

MR. KOLSKY: So the counseling letter that was issued to Mr. Martinez was based on certain missteps that were identified by the investigator with regard to Mr. Martinez. That letter did not counsel Mr. Davis. There was a separate oral counseling by Mr. Martinez of Mr. Davis relating to his unprofessional, certain unprofessional emails using profanity in certain emails. But the letter of counseling that was

10:10 issued and signed by Mr. Ishida, that was not based on conduct by Mr. Davis. That was a letter of counseling to Mr. Martinez.

The idea that the email was a sexual advance is also inconsistent with the evidence that Ms. Strickland invited Mr. Davis to go on a 45-minute walk with her just eleven days later on May 29. It's hard to see how she would have done that

if she thought Mr. Davis had just made a quid pro quo sexual advance. So the evidence does not show that Mr. Davis's conduct was unwelcome, that it was based on Ms. Strickland's gender, or that it was severe or pervasive. None of the conduct was sexual or romantic in nature.

And to illustrate just how far the evidence is from meeting the legal standard for sexual harassment, consider the Fourth Circuit's published opinion in *Hopkins v. Baltimore Gas & Electric Company*. There the First Circuit ruled that "A supervisor's conduct towards a subordinate was not sufficiently severe or pervasive to constitute actionable sexual harassment, even though the supervisor allegedly made repeated sexual innuendos, regularly commented on the plaintiff's appearance, frequently entered the bathroom when the plaintiff was there alone, asked the plaintiff about his sexual activity, held a magnifying glass over the plaintiff's crotch and asked where is it, and kissed the plaintiff."

The evidence that Ms. Strickland presented at trial in this case does not even come close to the conduct at issue in *Hopkins*, which, again, was not enough to constitute sexual harassment.

The evidence is also insufficient under a quid pro quo theory. Not only was there no quid pro quo request for the reasons I've already explained, but also there was no causal connection with any tangible employment action, and that's a

requirement under the quid pro quo theory. A plaintiff has to show that when he or she rejected an unwelcome sexual advance, the supervisor took a tangible employment action against the plaintiff; but the evidence shows that Mr. Davis was not involved in the actions that Ms. Strickland appears to be challenging in this case, and that's based on testimony from Mr. Martinez, Mr. Carpenter, Mr. Norman, and Mr. Davis. So Ms. Strickland has not come anywhere close to meeting her burden to prove sexual harassment, and that alone is fatal to her equal protection claim.

10:12

But she also has failed to prove that the government responded to her report of sexual harassment with deliberate indifference or that Tony Martinez acted with discriminatory intent. And the Fourth Circuit has said that deliberate indifference is a very high standard; a showing of mere negligence will not meet it.

Far from showing deliberate indifference, the evidence shows that the government responded promptly and effectively to Ms. Strickland's report of sexual harassment. Ms. Strickland

10:13

sent an email to Mr. Martinez on August 10, 2018, in which she claimed sexual harassment. Mr. Martinez promptly notified the Circuit Executive, who then notified the Chief Judge, and selected an investigator to look into the allegations, all of which was consistent with the EDR plan.

THE COURT: Excuse me again. It's pretty clear here

that Ms. Strickland has shown an animus, a bias, which Ms. Bean also commented on, against her. Now, how does that factor in here? And I may be anticipating your argument on due process, but I will tell you, I have concern where the Chief Judge in the Circuit says that it's not for him to take any action against Davis because given the position of the Defenders and their appropriate independence, that's for Martinez. Now, if Martinez is biased, doesn't that infect the whole process?

MR. KOLSKY: So a few things in response to that.

10:14 THE COURT: Yes.

MR. KOLSKY: Number one, Ms. Strickland has no right to secure discipline of another employee. Discipline occurs under Chapter 9 of the EDR plan. So, you know, she doesn't have any basis to say, you know, another employee needs to be disciplined, and that's up to the judgment of the head of the office, who was Tony Martinez. But also I disagree that, you know, Mr. Martinez had a bias or any sort of -- certainly there's no evidence of discriminatory intent. And on that topic, I think Circuit Executive Ishida --

10:15 THE COURT: It could be argued here, it could be argued -- maybe Ms. Strickland will or Ms. Strickland's lawyer -- that for whatever reason, he thought, "he," Martinez thought that she was -- I'll phrase it like this -- "playing the sexual harassment card in order to get the job advantages that she wanted."

Now, that's far from an independent judgment about the situation. He appears, and I take the cross-examination here, he appears to have been hostile to her. I have some real doubt whether that was based upon any gender bias, but as this went along, he -- well, I've said it -- seems quite hostile to her.

MR. KOLSKY: So both Mr. Ishida and Ms. Langley testified, and Judge Gregory in his deposition designations did as well, that the Unit Executive is not expected or required to be neutral in an EDR proceeding. That doesn't create any violation of Ms. Strickland's rights. Mr. Martinez was acting consistent with his role as the Unit Executive. So whatever his views about Ms. Strickland's motivations, that did not cause any deprivation of due process; and in fact the evidence confirms that Mr. Martinez's limited participation in the EDR process did not interfere with Ms. Strickland's rights.

During the mediation, Mr. Martinez offered Ms. Strickland a duty station transfer to Asheville that she had requested. He even offered to give her his own office in Asheville. So whatever he felt about the situation with Ms. Strickland, it sure didn't translate into any bad faith on his part during the mediation. And, you know, if anyone didn't participate in good faith during the mediation, it was Ms. Strickland, because how did she respond to Mr. Martinez's offer to give her his office in Asheville? Well, just three days later she sent a text message to a friend vowing to burn

the place down on her way out. That doesn't sound to me like someone who was trying in good faith to reach a resolution.

But getting back to the actions that Mr. Martinez took in response to the report of harassment on August 10, as I noted, he notified the Circuit Executive, who then initiated an investigation. Mr. Martinez agreed to Ms. Strickland's request to telework, agreed to allow her to report to the Appellate Chief, Josh Carpenter, and he rearranged the office's reporting structure so that Mr. Carpenter would report directly to Mr. Martinez instead of to Ms. Davis. And the evidence shows that the measures put in place by Mr. Martinez were effective. Ms. Strickland had virtually no further contact with Mr. Davis.

10:18

Now, Ms. Strickland has argued that Mr. Martinez was put on notice of her claims of sexual harassment by July 5. We dispute that because Mr. Martinez specifically asked Ms. Strickland if she was alleging sexual harassment, and she said she was not. But, in any event, Mr. Martinez did take action at that time to make sure Ms. Strickland was comfortable. Even though he understood the issue to be an ordinary workplace conflict, not sexual harassment, he still wanted to make sure she was comfortable. So Mr. Martinez assigned a new mentor to Ms. Strickland, he made sure she would not be assigned to work with Mr. Davis, and he instructed Mr. Davis not to email, text, or meet with Ms. Strickland; and as a result, there was no further contact of any significance between Mr. Davis and

10:19

Ms. Strickland after the July 5 meeting.

Now, Ms. Strickland also claims that Mr. Martinez retaliated against her for reporting sexual harassment, but the evidence shows that that is incorrect. She claims Mr. Martinez denied her a promotion to Grade 15, but she was converted from a research and writing attorney to an AFPD as she had requested. That conversion moved her to the ungraded AD pay scale; she was not eligible for a promotion, although the conversion did increase her long-term earnings potential. Mr. Martinez had no knowledge of when Ms. Strickland would become eligible to be considered for a discretionary promotion to Grade 15.

Ms. Strickland claims that her locality pay was removed when she was converted, but she testified that her salary immediately before she was converted included locality pay, and that her salary remained the same when she was converted, so she didn't lose any locality pay.

She claims that she was forced to telework, but she requested telework from Mr. Martinez. She told him that "A long-term resolution that allows me to work remotely and report to the Appellate Chief in Asheville is fine with me." She told Nancy Dunn at the Administrative Office that "If I have to work remotely until there's space in Asheville, that is completely fine with me." She told Circuit Mediator Ed Smith that she preferred teleworking and works better on her own.

And she never told Mr. Martinez that she was not happy teleworking.

She claims her duties were diminished, but her official grievance says otherwise. It says there was no change in job responsibilities when she was converted to an AFPD; and Mr. Carpenter, who was her supervisor at the time, testified that her duties remained the same and that she performed the same work as the other attorneys in the Appellate group.

In fact, in January, 2019, Mr. Carpenter offered
10:21 Ms. Strickland an opportunity to argue a case in the Fourth Circuit, but she declined that opportunity. And her interpretation of that email exchange with Mr. Carpenter is very revealing: She thought he didn't want her to do the argument, even though in that email he is bending over backwards to try to accommodate her, even offering to reassign her other work obligations so that she could focus on the argument.

And that's indicative of a larger problem here, your Honor, which is that Ms. Strickland has consistently misinterpreted statements made to her and misinterpreted
10:21 people's intentions. She finds nefarious explanations for entirely ordinary interactions. She misinterprets Mr. Carpenter's very gracious offer to reassign her other work so that she could do the Fourth Circuit argument. She misinterprets Mr. Davis's emails offering to get drinks as sexual harassment, even though she had recently told him that

anytime he wanted to get a drink with her, that would be fine. She misinterprets Mr. Davis's "mas dinero" email as a quid pro quo request, even though the email is entirely consistent with her request from earlier that day that she wanted to be paid more money or she would quit.

She misinterprets Mr. Martinez's words when he attempted to clarify whether she had been touched by Mr. Davis. She falsely claimed that Mr. Davis had said "At least you weren't touched." Mr. Martinez never said that. The recording 10:22 of the August 9 conversation is in evidence, and it confirmed he never said that.

She misinterprets the letter of counseling that Mr. Martinez received as a letter of reprimand. In fact, even yesterday she filed a document in this case repeatedly referring to it incorrectly as a "letter of reprimand," despite the clear evidence at trial to the contrary.

In short, Ms. Strickland has in her mind a view of the events at issue in this case that is completely at odds with the objective evidence.

10:23 THE COURT: What do you say --

MR. KOLSKY: Now, the evidence --

THE COURT: Wait. Two questions just to move this on. What do you say she has to prove as a basis for her claim of front pay here? That is, what triggers the duty to pay front pay from the Judiciary's point of view?

MR. KOLSKY: So front pay is awarded for lost compensation. So to be eligible for that, she has to show that she lost compensation through a wrongful termination. There's no actual termination here, so she would have to show a constructive termination, and that requires her to show that working conditions became so intolerable that a reasonable person in her position would have felt compelled to resign. Her working conditions were not intolerable at any time, and certainly not when she resigned in March, 2019. At that point she had been teleworking since August, 2018. She had virtually no contact with Mr. Davis since July.

In fact, she doesn't even contend that her working conditions were intolerable in March, 2019. Rather, she testified she believed she was constructively discharged because she felt she was no longer welcome at the Federal Defender's Office. Well, that's not the standard. And she testified that she believes she was constructively discharged in November of 2018, but she didn't leave the Federal Defender's Office until nearly five months later because she wanted to wait until she found a new job. But the situation wasn't intolerable if she could wait months and months until she found acceptable replacement employment.

THE COURT: Let me ask you -- again, this is contrary to your argument, and I fully understand that, but I do have a question about this -- if I get to the issue of front pay, I

have two, not concerns but two aspects of it I'll ask you about, two questions: Do you agree that if the Judiciary is liable on the issue of the failure, in a constitutional sense, to afford her due process -- that's the first question -- if she doesn't succeed on equal protection but she does succeed on due process, is front pay available? First question.

Second question: If front pay is available on either theory, I candidly don't get your argument that -- I don't understand the evidence you put in of what Duke graduates would get. That seems to trench on some sort of duty to mitigate her damages and earn as much as she was earning at the Federal Defender's Office.

Now, what she's doing is important, socially beneficent work. It doesn't pay much, but I just don't see any duty on her part to go out and earn as much as she can because her pay was greater while she was a Defender. I know you don't think the Court's analysis should ever get that far, but if you could answer those questions.

MR. KOLSKY: Yes, your Honor. The first question, if there was a finding of liability on due process but not equal protection, whether front pay would be available. So front pay is not a remedy for a due process violation. The remedy for a due process violation is more process. She hasn't requested to, you know, reinstate her EDR claim or anything like that, so there would be no -- there's been no such remedy requested

here, but front pay is not a remedy for a due process violation.

And on the other question, I think the point we would make is that Ms. Strickland has a higher earnings capacity than her current work, so she could obtain another job making as much as she was making at the Federal Defender's Office, if not more, if she wanted to. And her decision -- I mean, she can, you know, she can take whatever job she wants, but her decision --

THE COURT: Suppose you're right on that, suppose you're absolutely right, she has the capacity, the capacity to earn more, but why is she required to do that if she is genuinely devoting her time to this indigent appellate defense work?

10:28

MR. KOLSKY: She has a right to take a lower-paying job, but she can't claim then that the government owes her the difference if that's her personal decision to accept lower-paying employment. And --

THE COURT: I'd like to see some authority on that because I'm not so sure she has a duty to mitigate her damages.

10:28

All right, about five minutes more. You go ahead.

MR. KOLSKY: Yes, I would just say, you know, it is her burden to prove her losses, and she was making more money as a law clerk. I think within a couple months after she left the Federal Defender's Office, she was making more money than she was at the Federal Defender's Office.

But just a few other points, your Honor. One of the things Ms. Strickland must prove is that Mr. Martinez acted with discriminatory intent, and on that topic, Circuit Executive Ishida's testimony was especially powerful. He spoke directly with Mr. Martinez in the days following Ms. Strickland's report of sexual harassment, and he testified that Mr. Martinez was well-intentioned, acted in good faith. Mr. Ishida was in perhaps the best position of anyone to observe Mr. Martinez's state of mind at that time. His testimony on that topic is highly probative on the issue of discriminatory intent, and to rule for Ms. Strickland on the equal protection claim would require disbelieving Mr. Ishida's testimony.

Mr. Ishida also testified about his letter of counseling which identified certain missteps or things Mr. Martinez could have done better, but Mr. Ishida was clear that the letter contained no finding of wrongful conduct. Ms. Strickland has relied heavily on that letter, but it doesn't show any discrimination or retaliation occurred.

And the Court should not hold against the Fourth Circuit the fact that it tried to improve the Federal Defender Office's response to harassment reports by counseling Mr. Martinez on things he could have done better. That counseling is what any responsible employer would have done, and it would be a concerning precedent for every employer in this country. If the mere fact that an employer identifies

areas of improvement be used as a basis to impose liability in a discrimination case, that would have the perverse effect of discouraging employers from taking appropriate steps to improve their response to reports of harassment.

And getting back to your Honor's questions about front pay, the factors that the Court should consider for an award of front pay are Section 10 of our Findings of Fact and Proposed Conclusions of Law that we filed earlier this week.

THE COURT: Thank you.

10:31 MR. KOLSKY: And for these reasons, the Court should enter judgment for defendants on all claims remaining in the case and deny Ms. Strickland's motion for a preliminary injunction.

THE COURT: Thank you.

Ms. Strickland, Mr. Strickland, who's going to argue?

MS. STRICKLAND: I am, your Honor. Thank you.

THE COURT: And you may. I'll hear you.

MS. STRICKLAND: Thank you, your Honor. The Court has heard the evidence in this case and has had the chance to

10:31 observe the credibility of the witnesses' testimony. At this point the record confirms yet again that the allegations contained in my complaint are true.

Defendants' defense to these allegations is specious. Let's start with the Chief Judge's letter of reprimand. Coming into the trial, this Court stated that the letter was an

unimpeached public record. Following the trial, it remains so. Mr. Martinez testified that he did not deny any of the findings in this letter. He testified that he did not deny using a marriage metaphor to describe my relationship with the accused harasser. He testified that he did not deny that he had called me out for seeking advice and guidance from the Fair Employment Opportunity Office at the AO on my civil rights as a Judiciary employee. Indeed, he confirmed and doubled down on his statements that he was frustrated and angry that I went to the AO for guidance on my civil rights. That is protected activity.

10:32

Mr. Martinez also testified --

THE COURT: But wait, wait, wait. What came of that? You know, you're, like, advancing a retaliation claim, and, you know, there is much to what the Judiciary, through Mr. Kolsky, has said. This was termed a "letter of counseling." You persist in calling it a "letter of reprimand." What do you say to his argument that I shouldn't hold the Judiciary liable based upon good-faith efforts to improve a process here?

MS. STRICKLAND: Well, your Honor, I think there's a couple of responses. First, the "letter of reprimand" terminology was from the summary judgment ruling, not from us. But, really, it doesn't matter whether it's a letter of reprimand or a letter of counseling; it was disciplinary action under Chapter 9, a finding of wrongful conduct. And to say that somehow it would create a perverse incentive to impose

10:33

liability on this would simply disregard the duty of an employer to take action, timely action, prompt and effective remedial action on findings of wrongful conduct.

Defendants have repeatedly stated that Chapter 9 of the Plan doesn't impose remedies, but it does impose a duty on the employer to take action on wrongful conduct. That duty exists for every employer in the country, and it does not create a perverse incentive or do anything except do what the law requires, to impose liability for findings of sex discrimination.

10:34

THE COURT: Having made your claim here, and I guess I'm focusing on your due process claim, what process here do you think you were due?

MS. STRICKLAND: What process do I believe I was due? Is that the question?

THE COURT: It is, yes, ma'am.

MS. STRICKLAND: So the Fourth Circuit articulated all of this very well in its opinion when it stated that the EDR Plan creates both substantive rights -- the right to be free

10:35

from discrimination, harassment, and retaliation in employment -- but it also creates a procedure and procedural rights. And one of the things that the Fourth Circuit said was that the failure to disqualify Anthony Martinez, the Federal Defender, even though he was an accused party, created a conflict of interest.

Now, the Fourth Circuit at the time of its decision did not know -- none of us knew outside of the defendant -- how severe and pervasive this conflict of interest really was. And the evidence on this claim, and I believe your Honor mentioned it, remains unrefuted that Heather Bean, the EDR investigator, recommended that he be disqualified, not only because he was an accused party but because he was too biased, and he could do more damage if allowed to participate.

Mr. Ishida testified that he did discuss Ms. Bean's recommendation with Chief Judge Gregory. In contrast, Chief Judge Gregory testified during his deposition that he had not been made aware of this email; but either way, this failure to disqualify Mr. Martinez when he had engaged in conduct warranting --

THE COURT: I guess I don't understand. Again, the Fourth Circuit in its most important opinion, the opinion that both guides and controls this Court, and whose mandate I must strive entirely to fulfill, was operating on the basis, as we all were operating then, on the basis of your complaint. And the evidence as it has been developed here shows that he was not any decision-maker in the furtherance of the resolution of your complaint, or at least that's how it appears to me.

So the fact -- and I do think your cross-examination of him was effective -- he was hostile to your performance, that's true, and you brought that out, but that's not -- they

did not convey to you, it seems to me on this record, that he was a decision-maker here. So that's why I'm asking, what due process -- to disqualify him, what role, what pernicious role did he play here on the evidence as we actually see it?

MS. STRICKLAND: Yes, your Honor. Well, first of all, we understand the ruling about the decision-maker from earlier in the trial, and we would preserve our objection to that ruling. And we believe that our proposed findings have numerous and numerous pages of what was actually said contemporaneously at the time that was communicated that the Defender, in his position as Unit Executive, would have been, as a practical matter, the decision-maker in a final hearing. But I would also contend that that doesn't matter --

10:38

THE COURT: I have to interrupt you because I've read this Plan carefully, and I don't see -- cite to the Plan where he would be the decision-maker in a final hearing. We never got to the final hearing. That's one of the concerns I have on the due process ground. It appears that this, from the Judiciary's point of view, this thing was resolved at the mediation stage. Isn't that so?

10:39

MS. STRICKLAND: No, your Honor. In fact, that was exactly the argument that the defendants raised on dismissal that was rejected by the Fourth Circuit. And I would note that the defendants never contended here any sort of exhaustion argument at the appeals stage, and the Fourth Circuit said that

even if exhaustion had been raised as a claim, they understood I didn't exhaust my claims. That's because I was constructively discharged and forced to end the EDR process before it concluded. And I would like to say --

THE COURT: Detail for me in your argument the elements of your constructive discharge before the EDR process completed. Could you please do that.

MS. STRICKLAND: Yes, your Honor. I will start on that with two things about Mr. Ishida's testimony in particular as it relates to the claim of constructive discharge. First, Mr. Ishida confirmed, as stated in his March 25, 2019 memorandum, that the Fourth Circuit did not even begin the process of taking disciplinary action on these allegations until after I resigned from the FDO. The memorandum even states, and I quote, "The last remaining matter" which conveniently followed my resignation, "is Ms. Strickland's report of wrongful conduct under Chapter 9 of the Plan."

Even though the investigation itself took an unacceptably long time, the amended investigation report with these recommendations had come out in January, 2019, months earlier. There was simply no justification not to take prompt and effective action based on the investigation findings. Any reasonable person in my position who was told that no disciplinary action would even be considered after the report came out would feel compelled to resign on that basis alone.

And, second, the failure to disqualify Mr. Martinez, despite his hostility and bias, and the fact that he had engaged in wrongful conduct also contributed to the constructive discharge.

THE COURT: The hostility --

MS. STRICKLAND: The purpose of --

THE COURT: Wait, wait. The hostility of Mr. Martinez, at least as you developed it at trial, was with your work performance, not based on gender. Now --

10:41 MS. STRICKLAND: Well, your Honor, I would direct you back to what the findings are in whether we call it a letter of reprimand or a letter of counseling. Using a marriage metaphor to describe my relationship with the accused harasser is sex discrimination. Calling me out for seeking advice and guidance from the AO on my legal rights is sex discrimination. Making statements that there was no physical contact, which the investigator found were words to the effect that "At least you were not touched" and "were callous, minimizing, and sensitive and contributed to the distress that Ms. Strickland felt as

10:42 stated in the report," that is sex discrimination.

THE COURT: On the last --

MS. STRICKLAND: Without a --

THE COURT: Wait a minute. Wait, wait a minute. On the last point, there's a factual dispute there which I have to resolve and I will, but I asked a question, and now you've

answered it. You've answered it directly, and I appreciate that, but what's the authority under which I act here? The Fourth Circuit law that the failure to discipline the marriage metaphor -- ill-advised, you're absolutely right -- but you've drawn the conclusion that that's sexual harassment on the part of Mr. Martinez. I don't see the authority for that, respectfully.

MS. STRICKLAND: Well, yes, your Honor, it is not just me saying that. It is what is in this letter itself. It is the fact that disciplinary action was taken for wrongful conduct under the EDR plan, which requires a finding of sex discrimination, sexual harassment. Here we had deliberate indifference to quid pro quo sexual harassment, which your Honor correctly recognized the investigation found.

10:43

And I would also point out that our conclusions of law cite numerous, numerous cases about the use of derogatory gender stereotypes, which his marriage metaphor was, about sexual harassment that is based not only on sexual advances but also on the use of derogatory gender stereotypes and the expectations of how supervisors expect their subordinates to relate to them in the office. The record is rife with examples of that conduct here, and your Honor saw it in Martinez's testimony.

10:44

You have to ask yourself, if he's so hostile towards me, where is this coming from? And why, why is there such a

double standard, when the Court heard this inappropriate anger from Defendant Martinez? When he was challenged on his narrative that I was not a team player, which is yet another gender-based euphemism, he got angry about that, and even had the audacity to state that it reflected poorly on my character, but, shockingly, he did not even believe that JP Davis's quid pro quo "mas dinero" email and other profanity-laced work communications warranted disciplinary action. That is sex discrimination. That is a sexist double standard in the working environment that is based on gender, and that creates a hostile working environment and constitutes deliberate indifference based on sex, based on gender.

10:45

THE COURT: One --

MS. STRICKLAND: I would also point out as well --

THE COURT: Let me go back to one particular aspect of your cross-examination, which, as I say, I think is effective, but I'm not sure that it demonstrates sex discrimination, but I've got to reflect on that. That's what you're arguing. But with this interchange, you asked him about the imposter syndrome when you were inquiring of him about -- when you had spoken to him about cross-examining that police officer, and he said he didn't know what that was. And you followed up, but I sustained the next question because the witness said he didn't know what the imposter syndrome was.

10:46

Well, I know what it is, and I'm familiar with it, but

I had not thought -- you draw the conclusion it's gender-specific, that the imposter syndrome falls especially on female employees. That, one, has not been my understanding, but if there's authority for that, I would like to be provided it. I'm not sure that that's so.

Go ahead with your argument. I simply raise that as a concern.

MS. STRICKLAND: Yes, your Honor, I'm happy to provide authority on that. It's my understanding that studies have found that that is a gender-based phenomenon, or that it's excused more in favor of one gender towards another. Of course it's not saying that it can't happen to men, just like we don't intend to say that sexual harassment cannot happen to men. Of course it can happen to men, but that doesn't mean that sexual harassment is not a form of discrimination based on gender, which it clearly is.

Let me go back and figure out exactly where I was in my script. I do want to say one thing about the due process claim and their argument that the only remedy for a due process violation is more process. That is simply not true. The question here that is relevant is whether there was a constructive discharge and involuntary resignation; and if an involuntary resignation is caused by a due process violation, then the remedy for that is front pay or equitable relief. It's not exclusively limited to more process. I'm not aware of

any precedent that supports that contention.

THE COURT: What's your best case on that?

MS. STRICKLAND: I couldn't give you a name sitting here right now. It is cited in our conclusions of law, but we do have case law. I believe it's from the Seventh Circuit. I don't know that there's case law from the Fourth Circuit, besides the opinion in this case, of course, at the dismissal stage; but there is very detailed precedent from the Seventh Circuit describing the different forms of involuntary resignation as a result of a due process violation, and I'd be happy to give you those cites in supplemental briefing.

10:49

THE COURT: Thank you.

MS. STRICKLAND: Thank you. But I do want to say that the failure to disqualify did contribute to the constructive discharge here. And I want to reiterate that the purpose of the EDR process is to provide a safe working environment and to discharge the Judiciary's obligations to its employees. And it's important to stress again that while defendants continue to assert that Chapter 9 provides complainants no rights, it does compel a duty on the employer to take appropriate action. By failing to take prompt and effective remedial action and by failing to provide a fundamentally fair process, the defendants gave me no choice but to resign and forgo my chosen career as a Federal Public Defender.

10:49

I'm happy to talk about the individual witnesses in

this case. I think I've already spoken about Defender Martinez. With respect to First Assistant JP Davis, the Court heard his overly rehearsed and utterly incredible testimony about so-called coping skills and shadowing allegations. Mr. Davis could not explain his inappropriate, obsessive, and even threatening communications at the time when he became furious at me for not attending an optional sharing activity. He even stated to another supervisor contemporaneously that I should be slapped and smacked. You saw his email rant to himself about me, which showed his obsession with controlling me and his anger based on longstanding derogatory gender stereotypes that he held about professional women, particularly those in the legal profession.

10:50

Mr. Davis admitted on the stand that he knew I was avoiding him, even going to lengths to call in sick based in part on the advice of AO officials, but he still did not stop requesting that I meet with him alone and outside of the office.

Mr. Davis admitted that his quid pro quo "mas dinero" email was stupid, and it has been characterized as a joke, but let me be clear: It was threatening and traumatizing, particularly coming from a male supervisor with so much power and authority, both physically and over my career.

10:51

It's amazing that the defendants will continue to suggest that the sexual harassment existed only in my quote/unquote "mind," which is a gender-based trope about sexual

harassment victims, when their own investigation found that quid pro quo sexual harassment had occurred.

Despite defendants' assertions that my job duties were not reduced and that Mr. Davis did not participate in decisions about my job duties, those assertions are disproven by their own contemporaneous communications. Appellate Chief Josh Carpenter was forced to acknowledge this fact when he testified that Mr. Davis directly participated in the conversations about the conversion from R&W to AFD positions. Unsurprisingly, those conversations led to me being taken off the track to an AFD position with my own case load, not being considered for a promotion to Grade 15, and being required to do research and writing work under Mr. Davis's supervision in the Trial Unit.

Mr. Martinez also required me to continue doing research and writing work under Mr. Davis's Trial Unit, even though there was an open position in the Appellate Unit at the time.

Defendants also point to a January, 2019 email, months after Mr. Carpenter signed himself up for an oral argument, supposedly to show that he acted in good faith to accommodate me. It's important to note that Mr. Carpenter only sent this email the day after the investigator contacted him to investigate his conduct for the EDR investigation. That is not a misinterpretation on my part, and it does not show good faith.

All of these facts were undisputed at the summary judgment stage. They remain undisputed now, and they clearly establish that Mr. Martinez ratified and facilitated Mr. Davis's quid pro quo sexual harassment.

Both Mr. Carpenter and Mr. Davis also testified regarding Mr. Davis's emails about my fuck-off attitude and my supposed fireable offenses, which appear to be nothing more than not acquiescing to his sexually harassing behaviors. Defendants' flimsy arguments are addressed in detail in our proposed findings of fact and conclusions of law, and I won't repeat everything here, but I do want to point out that if I schemed the EDR process just to get a transfer to the Asheville office, then I may be the worst manipulator alive.

You heard Mr. Martinez testify that I had never even remotely requested a transfer to Asheville before these allegations were raised, and when he eventually offered a transfer to Asheville six months into the EDR process, I did not take it. Defendants sadly continue to ask this Court to believe that I fabricated a sexual harassment claim for a transfer that I did not even take.

Defendants' story does not make any sense. According to them, I made this up to get a transfer, but then I apparently changed my mind and decided to manipulate the EDR process instead for a five-month term clerkship, even though I had already served in three prior judicial clerkships and a

fellowship. It doesn't make any sense. What does make sense is that I was desperate to get out of that office, I was desperate to get out of a hostile working environment, and I was desperate to get away from my sexual harasser; and then, after months of intentional delay, when others would do nothing, I did whatever I could to get out. In this context --

THE COURT: I'm challenging you only on when you said "intentional delay." Who is responsible -- whose intent are you talking about there? This did take overly long. The Federal Courts not infrequently take overly long. It's something we are criticized for frequently and appropriately. But you're talking about intentional delay. Whose intent?

10:55

MS. STRICKLAND: Yes, your Honor, I think there are really two answers to that question. The first is what I spoke about earlier when Mr. Ishida said that the investigation would be held in abeyance after the investigation report came out. It's hard to read that as anything but intentional because the investigation had concluded. But I would submit here that the person who is really at fault for all of this, the person who is really in charge is Tony Martinez. He knew about these allegations since July, 2018, if not earlier. His testimony was simply not credible that he was not aware of this. He created a significant event log, and he admitted that he does not create significant event logs for ordinary work disagreements. So he knew, but he simply did not address the

10:56

conduct for months, so he is ultimately responsible. And he --

THE COURT: I want to be clear what you're arguing. You're saying knowing and understanding that you are claiming sexual harassment, he deliberately delayed taking action? That's what you're saying?

MS. STRICKLAND: For Mr. Martinez?

THE COURT: Yes.

MS. STRICKLAND: Yes, absolutely.

THE COURT: All right. All right, about five more minutes.

MS. STRICKLAND: Thank you. I do want to address the arguments about teleworking and a couple other points in the remedy.

So about teleworking, you heard the Defender testify that the office in Asheville is only his office in the sense he had a computer there. It was not really his office because it was a shared space. You heard the Defender testify that he advertised for an intern to work in that space while these allegations were pending, although he said that I could not work in Asheville because he had no office space. That was false, making clear to me that the only option was to go on telework while hiring an intern for that duty station was punitive, humiliating, and retaliatory. It was a career-ending step. It communicated that I was less valued than a summer intern. It communicated that an employee who complains about

sexual harassment and sex discrimination will be ostracized from the office. It resulted in a constructive discharge.

I also want to point out who you did not hear from at trial Fair Employment Opportunity Officer Nancy Dunham, and her deposition is part of the record, and she testified that Mr. Davis's conduct was, quote, "classic sexual harassment." She explained that it is common in sexual harassment cases for people to have interpersonal relationships that are positive that later change after a battery is caused. Further, warm
10:58 interpersonal relationships that are positive can be seen or understood as grooming, in hindsight, for further sexual advances.

Ms. Dunham explains that Mr. Davis's conduct was about his desire for control, which is very common in sexual harassment cases, especially when there is a huge power imbalance. To further explain this concept, she compared my case to allegations against Governor Andrew Cuomo by a woman who alleged that he had made her uncomfortable by his obvious sexual and romantic interest. She explained, "There was never any groping or
10:59 physical assault in my case, and I remember thinking that is exactly what happened with Caryn Devins: no physical touching, no groping, but nevertheless a desire to control her and an obvious interest in her either sexually or romantically."

Ms. Dunham also explained that in her 35 years of employment law experience, she is more likely to disbelieve

than to believe allegations of sexual harassment, but she strongly believed me. Likewise, this Court should compare the credibility and consistency in my allegations, as confirmed by the investigation's findings, with the lack of credibility of defendants' witnesses.

I do want to talk about one other thing with Ms. Bean and Frank Johns, which is that you didn't hear from Ms. Bean as a witness in this case. That appears to be because they cannot stand behind the quality of her investigation. But even so, 11:00 Ms. Bean still could not ignore the obvious evidence of quid pro quo sexual harassment and sex discrimination which led to the discipline of both the First Assistant and the Federal Defender. Ms. Bean and Mr. Frank Johns, the Clerk of Court for this entire district, also mocked me for applying for a law clerk position in the District Court. After I withdrew my application, Mr. Johns --

THE COURT: Wait, wait, wait, wait. Forgive me. You have about a minute left, but I want to know where -- you're now taking on after Mr. Johns. Where is this in the record?

11:01 MS. STRICKLAND: We've moved for it to be admitted as an exhibit, but it's also subject to judicial notice because it's in prior filings. The reason why we're using this email is to show that the career damage for this was long term, the damage to my reputation was long term, and it continued even though they were aware that I had accepted a Fourth Circuit

clerkship, and that is relevant to the remedy component of this.

I do think that the issues about front pay have been extensively briefed, so I won't say too much about that, except I don't believe there is a lot of difference between the two front pay experts, and even their expert seems to acknowledge that a substantial front pay award is warranted in this case. And we would submit that the award of six years of front pay plus lost pension benefits amounting to $692,881, plus an appropriate tax (Unclear), is the absolute floor of what the record supports in this case because that number comes from defendants' own expert. But really Dr. Albert's testimony establishes that the amount should be much higher, but whatever the Court awards, it should award an amount that appropriately accounts for the long-term career damage here.

So in closing, I would like to renew our prior motions to admit exhibits and deposition designations. I renew the motion for preliminary injunction relief. I also object to defendants' reliance in their conclusions of law on the alleged after-acquired-evidence defense that was not pleaded or disclosed in discovery. And I would note that if this was a proper part of the trial, we would have put on evidence that JP Davis disclosed thousands of pages of unredacted client information to an employee at the Probation Office, but those documents are in the record and they are subject to judicial notice. And I also renew my objection to defendants' untimely

exhibit and deposition designations. Thank you.

THE COURT: Thank you. Well, I thank you all, and my thanks is sincere. The matter is now before the Court, the responsibility to rule on these matters.

One correction, Ms. Strickland. You're not now seeking a preliminary injunction. You're seeking an injunction, and I will take that under advisement.

I said I would ask this at the close of the arguments and I do. It's this, and I do this routinely in jury-waived cases: If there is any hope of you people getting together and resolving the case, now that we are at an end, save only for the decision at the trial level, I will respect that and stay my hand until some date that you agree to. On the other hand, there has been discussion throughout this about delay, and I'm prepared to begin working on this matter at once. But I do want to ask if you would like me to stay my hand so you can talk among yourselves for a brief period. You both have to agree.

We'll start with the plaintiff. Do you want me to start or stay my hand for some reasonable period, Ms. Strickland?

MS. STRICKLAND: Thank you, your Honor. Thank you for making that offer. We don't believe that further settlement discussions would be productive at this point.

THE COURT: Very well. You both have to agree and one does not. I will get to work with all reasonable speed, given

my other obligations.

My thanks to counsel is genuine. At least in the trial of this case, all counsel -- and I speak to both Mr. and Mrs. Strickland and I speak to counsel for the Judiciary -- conducted themselves both appropriately and forcefully. This is how a case ought to be tried, and I have been privileged to be the judge who's had the obligation and chance to preside over it. Thank you. We'll stand in recess.

THE CLERK: All rise.

11:05 (Adjourned, 11:05 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 40 inclusive, was recorded by me stenographically at the time and place aforesaid in CA No. 20-00066-WGY, Caryn Devins Strickland v. United States of America, et al, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated this 28th day of February, 2024.

/s/ Lee A. Marzilli
_____
LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER